

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

ORIGINAL
FILE

In the Matter of)
)
Reexamination of the Policy)
Statement on Comparative)
Broadcast Hearings)
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RM-7741 FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS

Skyland Broadcasting Company ("Skyland"), by counsel and pursuant to the Commission's Notice of Proposed Rulemaking, FCC 92-98, released April 10, 1992 (hereinafter "NPRM" or "Notice") in this proceeding, respectfully submits the following comments for the Commission's consideration:

1. Skyland is 100% minority-controlled and 92% minority-owned. Skyland is one of five applicants in an ongoing comparative hearing for a new FM broadcast station in Biltmore Forest, North Carolina (MM Docket No. 88-577).¹

2. In this NPRM, the Commission has commenced a comprehensive reexamination of its comparative broadcast hearing criteria. As indicated in the Notice (at paras. 14-15), the Commission will consider, inter alia, the elimination of the "integration" criterion (based upon which Orion was declared the winner in the Biltmore Forest case). The Commission, however, has stressed (NPRM at paras. 23-24) that it does not intend to change the

¹ The applications were filed in 1987. Petitions for reconsideration of a Commission decision, National Communications Industries, 7 FCC Rcd 1703 (1992), and Motions to Enlarge Issues against Orion Communications Limited ("Orion") are currently pending before the full Commission.

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proportionate weight currently given minority ownership in the overall comparative evaluation.

3. The Commission has proposed in the NPRM (at para. 41) that the revised criteria would only apply prospectively to those applications not in the hearing process as of the effective date of FCC action in this Docket. It is on this aspect of the Commission's proposal that Skyland desires to comment.

4. In the Notice (at para. 41), the Commission, citing appellate court decisions in Multi-State Communications, Inc. v. FCC, 728 F.2d 1519, 1525-26 (D.C. Cir. 1984) and FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958), has noted that "a party has no vested right in the application of the former rules, although it may have proceeded on the assumption that the former rules would remain in force."

5. Skyland respectfully submits that, in furtherance of the public interest in advancing minority ownership, proposed new comparative criteria adopted herein, including the retention of the minority ownership preference, should in fact be applied across the board to applications currently in the comparative hearing system.² The Commission should look to apply its 1992 comparative policies-not its questioned comparative policies adopted almost 30 years ago (see NPRM at para. 13)-to applications currently pending in 1992. To do otherwise would clearly raise issues of arbitrary and unreasonable agency action.

² Indeed, if the pending motions against Orion are granted, the Biltmore Forest applications will be back before an Administrative Law Judge.

6. Indeed, the Review Board, the Commission's delegated reviewing authority for comparative broadcast adjudications, has refused to apply to current cases the law of previous comparative hearing decisions which subsequently have been vacated by the Commission. See Georgia Public Telecommunications Commission, FCC 92R-34 (released May 8, 1992) at para. 32 ("the Board cannot rely on an opinion that has been vacated"), citing Shawn Phalen, 7 FCC Rcd 623, 629, n. 23 (Rev. Bd. 1992); see also, Opportunity Broadcasting of Shreveport, FCC 92R-43 (released June 1, 1992) at para. 11 (Review Board not free to alter Commission's analysis in a decision said to be inconsistent with Commission's previous stance on a particular issue).

7. In closing, Skyland would point out that the Commission has indicated its desire to stand by the "Congressional enactments intending to prohibit the Commission from eliminating or diluting [the preference for minority ownership]" (NPRM at para. 23). If the Commission were to adopt a "prospective only" minority ownership preference, Skyland submits that any Commission claim of "consistency with Congressional enactments" would be hollow, particularly in view of (i) the number of pending FM applications with minority-controlled and minority-owned applicants currently in the hearing process and (ii) the relatively small number of anticipated future opportunities for filing applications for new FM broadcast stations in the post-Docket 80-90 environment.

CERTIFICATE OF SERVICE

I, Robert A. DePont, do hereby certify that true copies of the foregoing Comments were sent this 2nd day of June, 1992, by first-class U.S. mail, postage prepaid, to the following:

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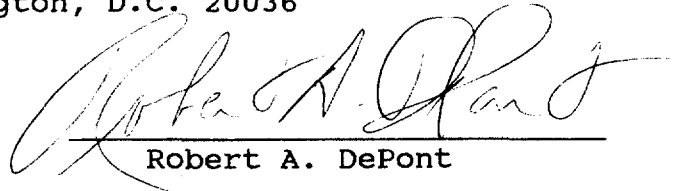
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Respectfully submitted,

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